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Supreme Court, U.S.
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In The Supreme Court Of The United States

OCTOBER TERM, 1988

CHANDLER NELSON HUGHES,

Petitioner,

v.

HALIFAX COUNTY SCHOOL BOARD; JAMES GREGORY; HERBERT LLOYD; and JULIAN HARRISON,

Respondents.

PETITION FOR WRIT OF CERTIORARI

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No. _____

IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1988

CHANDLER NELSON HUGHES,

PETITIONER

V.

HALIFAX COUNTY SCHOOL BOARD;
JAMES GREGORY; HERBERT LLOYD;
and JULIAN HARRISON;

RESPONDENTS

PETITION FOR WRIT OF CERTIORARI

QUESTIONS PRESENTED

1. Did the attempted lynching of Petitioner by Respondents Lloyd and Gregory constitute action taken under color of state law in violation of 42 U.S.C. § 1983?

2. Was there sufficient evidence of a municipal policy or custom of retaliation by the Halifax County School Board against Petitioner for his participation in the grand jury investigation to survive a motion for a directed verdict on his 42 USC § 1983 claim?

3. Was there sufficient evidence of supervisory retaliation and inaction by Julian Harrison against Petitioner to survive a motion for a directed verdict on Petitioner's 42 USC § 1983 claim?

4. In the absence of the required specific motion for a directed verdict on the issue of Petitioner's lost wages, was it error to grant Respondent Lloyd's JNOV motion?

5. Was the evidence sufficient to survive Respondent Lloyd's JNOV motion on the issue of whether Lloyd's

attempted lynching of Petitioner was the proximate cause of Petitioner's lost wages?

DESIGNATION OF PARTIES

The parties to the appeal before the United States Court of Appeals for the Fourth Circuit were Petitioner Chandler Nelson Hughes and the Respondents Halifax County School Board, James Gregory, Herbert Lloyd, and Julian Harrison. The foregoing named parties plus Tommy Lacks, an additional party-defendant, are the same parties as were before the court of original jurisdiction, the United States District Court for the Western District of Virginia.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit below (Appendix I, infra.) is published at 855 F.2d 183 (4th Cir. 1988). The opinions and orders of the United States District Court for the Western District of Virginia (Appendix II, infra.) are unpublished.

JURISDICTIONAL STATEMENT

The judgment of the United States Court of Appeals for the Fourth Circuit was rendered on August 26, 1988. The jurisdiction of this Court is invoked pursuant to Title 28 U.S.C. §1254(1).

UNITED STATES CONSTITUTIONAL PROVISIONS, UNITED STATES STATUTES, AND RULES OF COURT INVOLVED

The United States Constitutional Provisions, Statutes, and Rules of Court involved are the First and Fourteenth Amendments to the United States Constitution; 42 U.S.C. §1983; Rule 50(a) of the Federal Rules of Civil Procedure; and Rule 50(b) of the Federal Rules of Civil Procedure. The foregoing provisions, statues, and rules are set forth in toto in Appendix III, infra.

STATEMENT OF THE CASE

Hughes, a black man, employed in the maintenance department of the Halifax County School Board, and Gregory and Lloyd, two white co-employees, were assigned to dig a foundation for a building on the grounds of a county school. After the workers ate lunch, Lloyd and Gregory began to discuss Hughes' participation in a grand jury and state police investigation of

alleged corruption and thefts involving the Halifax County School Board. They began to harass Hughes. Finally, Gregory said "Let's hang him for it." Gregory went to the van and took out a rope. He burned the ends of the rope with a torch and threw it over the limb of a nearby tree. Lloyd picked up the noose of the rope and approached Hughes with it. As Lloyd attempted to place the noose over Hughes' head and neck, Hughes physically resisted Lloyd's and Gregory's efforts to lynch him. Lloyd punched Hughes in the side of his head with his fist. Following a scuffle, Lloyd and Gregory, abandoned their efforts to hang Hughes.

When Hughes returned to the school maintenance office, he informed his supervisor, Julian Harrison, the

Director of Maintenance and Operations, of the assault and told him that the attempted lynching was in retaliation for his participation in a grand jury and state police investigation of the Board. Hughes explained to Harrison that the assault and battery was unprovoked, that he had been injured, and that he was going to visit a physician. Harrison indicated that he would discuss the matter with Lloyd and Gregory but indefinitely suspended Hughes from his employment. Harrison also advised Hughes that he could appeal the suspension decision to the Superintendent, Dr. Jones. Hughes immediately visited Dr. Jones and related the same version of the incident to Dr. Jones as he had just related to

Harrison. Dr. Jones announced that he too would investigate the matter.

About two weeks later Hughes indicated by letter to Harrison his desire to regain his employment. Harrison responded with his own letter, in which he indicated that he would not reinstate Hughes, and that he could appeal the suspension decision to Dr. Jones. Hughes, however, had already presented his appeal to Dr. Jones on August 8, 1984, and did not feel the need to appeal Harrison's suspension decision to Dr. Jones a second time. After a period of suspension, Lloyd and Gregory were reinstated by the Board. Hughes, however, was permanently terminated from his employment.

The attempted hanging occurred against the backdrop of Hughes'

cooperation during the fall and winter of 1983 and 1984, with a state police and Halifax County grand jury investigation into allegations of corruption and theft directed at the Board, and the school maintenance department in which Hughes and the individual Respondents worked. The investigation of the Board was a controversial and much publicized event in Halifax County. Hughes' cooperation in the investigation was at a level higher than that of his co-workers and superiors. He was the only Board employee to submit to a polygraph examination. Hughes was called before a meeting of the Board and required to divulge the information he was disclosing to the police and grand jury. Hughes was called twice to testify

before the grand jury, and all but one member of the Board were indicted for crimes involving the corruption.

There was a great deal of animosity directed toward Hughes due to his cooperation with the authorities. Before the grand jury returned its indictment, Hughes was given the "cold shoulder" by the individual Respondents and other workers. After the indictments were returned, Hughes was subjected to constant harassment by his co-workers, including Lloyd and Gregory. The attempted hanging was the culmination of the hostility directed at Hughes.

Hughes subsequently filed a ten count action in a federal district court and based his action on several federal civil rights statutes, including 42

U.S.C. §1983, as well as various state law counts, including assault and battery and intentional infliction of emotional distress.

At the conclusion of Hughes' evidence at trial, the United States District Court for the Western District of Virginia, the court of original jurisdiction, granted the Board's and Harrison's motions for a directed verdict on the 42 U.S.C. §1983 claim. The District Court denied Gregory's and Lloyd's motions for a directed verdict but indicated it would enter a JNOV on the § 1983 claim if the jury returned a verdict in favor of Hughes.

After deliberation, the jury returned a verdict for Hughes against Lloyd and Gregory on the § 1983 claim. With regard to the two aforementioned

state tort law claims, the jury rendered its verdict for Hughes as against Lloyd, but in favor of Gregory. As part of its award of damages, the jury awarded Hughes $18,879.00 in lost wages. After the jury's verdict was returned, the District Court granted the Respondents' motions for JNOV on the § 1983 claim. For the first time in the proceedings, Lloyd objected to the claim for lost wages on the ground that Lloyd's actions toward Hughes were not the proximate cause of the lost wages.

On August 12, 1986, the District Court entered an Order granting Lloyd's motion for a JNOV on the lost wages issue. On August 26, 1988, the United States Court of Appeals for the Fourth Circuit affirmed the judgment of the District Court.

ARGUMENT FOR ALLOWANCE OF THE WRIT

1. THE ATTEMPTED LYNCHING OF PETITIONER BY RESPONDENTS LLOYD AND GREGORY CONSTITUTED ACTION TAKEN UNDER COLOR OF STATE LAW IN VIOLATION OF 42 U.S.C. § 1983.

In order to be entitled to relief under 42 U.S.C. §1983, Hughes had to show (a) that Respondents deprived him of a right secured to him by the Constitution or federal law and (b) that the deprivations occurred under color of state law. Flagg Bros., Inc. v. Brooks, 436 U.S. 149, 155 (1978). Action taken under color of state law includes "misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law." Monroe v. Pape, 365 U.S. 167, 184 (1961). It is not significant for purposes of defeating a §1983 action that the misuse

of power under color of state law was motivated solely for purely personal reasons. Id. at 184-186; Brown v. Miller, 631 F.2d 408, 410-11 (5th Cir. 1980).

Lloyd and Gregory were county employees, as was Hughes; the assault and battery took place on county property during county work hours while on a Board work assignment; and the hanging rope was county property and equipment. Most important, however, was the motivation for the attack. If there had been no investigation of the Board's corruption and Hughes had not exercised his First Amendment right of free speech in cooperating with the grand jury, Lloyd and Gregory never would have assaulted and battered him, thereby

depriving him of his constitutional rights.

It was error, therefore, to grant of Lloyd's and Gregory's motions for JNOV as to the § 1983 claim.

2. THERE WAS SUFFICIENT EVIDENCE OF A MUNICIPAL POLICY OR CUSTOM OF RETALIATION BY THE HALIFAX COUNTY SCHOOL BOARD AGAINST PETITIONER TO SURVIVE A MOTION FOR A DIRECTED VERDICT ON PETITIONER'S 42 USC § 1983 CLAIM.

Municipal liability results in 42 U.S.C. §1983 cases "when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts must clearly be said to represent official policy, inflicts the injury." Owen v. City of Independence, 445 U.S. 622, 633 (1980); Monell v. Department of Social Services of the City of New York, 436 U.S. 658, 661, 694 (1978). In addition to official or express policy, two additional bases of

municipal liability exist: (1) an unwritten "custom or usage" so prevalent as to have the force of law and (2) informal ad hoc decisions when made by officials having final policymaking authority. Id.

Municipal fault for allowing a "custom or usage" or informal policy to continue may be shown by the municipality's failure, as a matter of specific intent or deliberate indifference, thereafter to correct or stop the practice. Id. A policy can also be inferred from a municipality's omissions provided such omissions constitute tacit authorization of or deliberate indifference to constitutional injuries. See, e.g., City of Oklahoma City v. Tuttle, 471 U.S. 808, 823 (1985); Wellington v.

Daniels, 717 F.2d 932, 935-36 (4th Cir. 1983). Municipal policy may be found in formal or informal ad hoc choices or decisions of municipal employees, officials, and agents authorized to make and implement municipal policy. Pembaur v. City of Cincinnati, 475 U.S. 469 (1986).

The jury in this case could have reasonably found policy as against the Board either on the basis of a "custom or usage" or on the basis of the direct actions of Julian Harrison, as a final policymaker acting on behalf of the locality. As Director of Maintenance for the Halifax County Public School, it was Harrison's duty to investigate the lynching incident. Harrison was aware

of the grand jury investigation and knew that the subject of the investigation was the maintenance department and its employees. Harrison, Dr. Jones, and the Board were aware that Hughes had readily cooperated with the investigation. Harrison and other Board officials were aware that Hughes was frequently teased and harassed by other employees regarding his cooperation with the investigation of corruption and theft plaguing the Board.

There was also substantial evidence that Harrison had the final policymaking authority as to the personnel policies of the maintenance department within the Board. Both Harrison and the Board admitted that Harrison was Hughes' supervisor. They also admitted that Harrison had been granted authority by

the Board to carry out suspensions of subordinate employees within the Department of Maintenance. Hughes properly brought his concerns regarding the mock lynching to the appropriate policymaking official, Julian Harrison.

The absence of a specific Virginia state statute or regulation or case which would expressly cite Harrison as a final policymaker in regard to his actions toward Hughes is not dispositive of this issue. It is clear that a municipal agent or official may also have final authority in making and implementing policy despite a municipality's retention of powers or ultimate control over both policy and policymaker pursuant to state law. Id.; See also, Spell v McDaniel, 824 F.2d 1380, 1386 (4th Cir. 1987). The

question is one of authority-in-fact; the Board cannot escape attribution of policy to itself by retaining unexercised ultimate authority to countermand the policy or to discipline or discharge the policymaker. Id.

One inference from the evidence adduced is that either Harrison or Dr. Jones were policymakers and that they themselves were either motivated by tainted reasons in dismissing him, i.e., in retaliation for the exercise of his First Amendment rights, or that they were deliberately indifferent to the attack upon Hughes.

A second permissible inference is that the Board had itself adopted and condoned a policy of official hostility toward those employees cooperating with the grand jury investigation.

Substantial evidence was introduced that this was one of the major controversial issues confronting the Board, and that they stayed closely in touch with all facts concerning the grand jury investigation and the participation of Board employees with the grand jury and state police.

A jury could have reasonably inferred that the Board itself, either as a matter of implicit policy, or as a matter of "custom or usage" either encouraged or condoned the harassment suffered by Hughes because of his cooperation with law enforcement officials. It was error to grant the motion for a directed verdict.

3. THERE WAS SUFFICIENT EVIDENCE OF SUPERVISORY RETALIATION AND INACTION BY JULIAN HARRISON AGAINST PETITIONER TO SURVIVE A MOTION FOR A DIRECTED VERDICT ON PETITIONER'S 42 USC S 1983 CLAIM.

A governmental supervisor is liable for the constitutional torts of his subordinates when either he personally participates in the unconstitutional activity or where his indifference or tacit authorization enourages such action. See, e.g., Scheuer v. Rhodes, 416 U.S. 232 (1974); Orpiano v. Johnson, 632 F.2d 1096, 1101 (4th Cir. 1980), cert. denied, 450 U.S. 929 (1981). As to the former category of liability, a supervisor is liable for a §1983 violation where there is evidence of personal involvement in the denial of constitutional rights. Id.

As to the second category, a supervisor shares liability with his subordinates where supervisory indifference or tacit authorization of subordinates' misconduct is a causative

factor in the constituional injuries inflicted. Id. In order to succeed against a supervisor under this theory, a plaintiff must prove official inaction amounting to deliberate indifference or tacit authorization of the offensive practices. Id. The determination of this issue is essentially a question of fact, not of law.

Hughes made a sufficient evidentiary showing of both supervisory involvement and supervisory inaction to survive Harrison's motion for a directed verdict. Harrison fired Hughes merely for defending himself against an unlawful assault and mock lynching. It was brought to Harrison's attention that the assault was motivated in retaliation for Hughes' cooperation with law enforcement authorities. Harrison

admitted that Hughes was not the aggressor in the incident and that Lloyd assaulted Hughes with the rope.

There was no palpable reason for Hughes' suspension and dismissal. All that Hughes had done, even under Harrison's own stated understanding of the events, was to defend himself from the possible lynching. A clear and unmistakable inference is that Harrison, like the actual aggressors in the mock lynching, wished to do Hughes harm in retaliation for his cooperation with the law enforcement investigation of the maintenance department. Given these clear inferences from the evidence, a clear case of supervisory liability based on direct personal involvement was established. Id.

An alternative theory is that Harrison was "deliberately indifferent" to the unconstitutional retaliatory conduct of Respondents Lloyd and Gregory. Given the above-recited facts, Harrison still chose to do nothing to protect Hughes. Instead he fired Hughes. An obvious implication from this evidence is that Harrison simply did not care who was the aggressor or whether the attack had occurred because of Hughes' cooperation with law enforcement authorities. A clear case of "deliberate indifference" was made out on the evidence.

It is also clear that Harrison was the official who discharged Hughes. Harrison admitted in his Answer to the Complaint that he possessed the requisite authority to suspend Hughes

from his job. Harrison, in-fact, was the individual who actually suspended and terminated Hughes from his employment. It was error to grant the motion for a directed verdict.

4. IN THE ABSENCE OF THE REQUIRED SPECIFIC MOTION FOR A DIRECTED VERDICT, IT WAS ERROR TO GRANT RESPONDENT LLOYD'S JNOV MOTION ON THE ISSUE OF PETITIONER'S LOST WAGES BECAUSE LLOYD FAILED TO FIRST MAKE THE REQUISITE SPECIFIC MOTION FOR A DIRECTED VERDICT.

While Lloyd did move for a directed verdict at the close of Hughes' case and also at the close of all of the evidence in the case, Lloyd never raised the ground asserted in his motion for a JNOV, namely that the evidence was insufficient to submit the claim for lost wages to the jury. The question of lost wages was never addressed, argued, or even mentioned by counsel for Lloyd

until after the jury returned its verdict.

It is well settled that a motion for a JNOV must be predicated by an appropriate motion for a directed verdict. Hubbard v. White, 755 F.2d 692 (8th Cir. 1985), cert. denied 106 S.Ct. 107 (1985). Under Rule 50(a) of the Federal Rules of Civil Procedure, a motion for a directed verdict shall state the specific grounds therefor. If a party fails to specify an issue in his motion for a directed verdict, he may not subsequently challenge the jury's verdict on that issue, which is conclusive on that point. Bonjorno v. Kaiser Aluminum & Chemical Corp., 752 F.2d 802 (3d Cir. 1984), cert. denied 474 U.S. 811 (1985).

The requirement of a proper directed verdict motion as a foundation for a JNOV motion under rule 50(b) is not a mere technicality; it serves vitally important interests in the fair conduct of litigation. Miller v. Premier Corp., 608 F.2d 973, 979 n.3 (4th Cir. 1979).

It was error to refuse to enforce the requirement of a proper directed verdict as a foundation for the JNOV motion.

5. THE EVIDENCE WAS SUFFICIENT TO SURVIVE RESPONDENT LLOYD'S JNOV MOTION ON THE ISSUE OF WHETHER LLOYD'S ATTEMPTED LYNCHING OF PETITIONER WAS THE PROXIMATE CAUSE OF PETITIONER'S LOST WAGES.

In ruling on a motion for a JNOV, a trial court must consider the record as a whole and in the light most favorable to the party opposed to the motion. If there is substantial evidence opposed to

the motion, that is, evidence of such quality and weight that reasonable and fair minded men in the exercise of impartial judgment could reasonably return a verdict for the non-moving party, the motion should be denied and the case submitted to the jury. Continental Ore Co. v. Union Carbide Corp., 370 U.S. 690, 696 (1962); Gill v. Rollins Protective Services Co., 773 F.2d 592, 594 (4th Cir. 1985).

As a direct consequence of the attempted lynching by Lloyd and Gregory, Hughes was fired from his employment with the Board. Hughes was within his rights to complain of Lloyd's conduct to school officials, who conducted an "investigation." It was foreseeable to Lloyd that his tortious conduct, committed on the job during

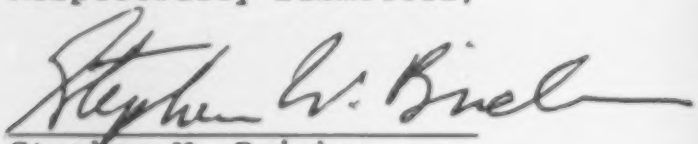
work hours, would lead to a school investigation. Lloyd then compounded the injury to Hughes by lying to Harrison about his own involvement in the altercation and that of Hughes. Lloyd told his superiors that he had never assaulted Hughes, he never placed the noose of the rope around Hughes' neck, and that Hughes was the aggressor in the incident.

From this evidence, it is clear that Lloyd's own intentional and tortious acts directly and proximately led to Hughes' suspension and termination from his job, which was the basis for the lost wages.

CONCLUSION

For the reasons stated herein, it is respectfully submitted that this petition for writ of certiorari should be granted.

Respectfully submitted,



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APPENDICES

APPENDIX I

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

NO. 87-2641

Chandler Nelson Hughes,

Plaintiff-Appellant,

versus

Halifax County School Board;
James Gregory; Herbert Lloyd;
Julian Harrison

and Defendants-Appellees.

Tommy Lacks Defendant

Appeal from the United States District Court for the Western District of Virginia, at Danville. Jackson L. Kiser, District Judge. (CA-85-0161-D)

Argued: June 7, 1988
Decided: August 26, 1988

Before POWELL, Associate Justice (retired), United States Supreme Court,

sitting by designation, and ERVIN and WILKINSON, Circuit Judges.

Mark Sheridan Brennan (Stephen W. Bricker, BREMNER, BABER & JANUS on brief) for Appellant. Dennis Patrick Lacy, Jr. (LACY & MEHFOUD, P.C.; DON P. BAGWELL, SR., BAGWELL, BAGWELL & BAGWELL on brief) for Appellees.

ERVIN, Circuit Judge:

Appellant, Chandler Nelson Hughes, challenges the propriety of the district court's actions in granting directed verdicts or judgments notwithstanding the verdict in favor of the appellees on his S 1983 claims.[1/] Finding no error below, we affirm.

1/This is not the first time that this case has been before us. On September 24, 1986, Hughes filed a motion in the district court seeking entry ofjudgment upon the court's order of August 12, 1986, which denied him relief on the S

(Continued on next page)

I.

This case began on August 8, 1984, when Hughes and three co-workers were sent to Turbeville Elementary School to dig a foundation for a building. The men worked for the maintenance department of the Halifax County School Board. After their lunch break, two of Hughes' three co-workers (Lloyd and Gregory) began to tease him about his participation in a grand jury investigation of the school board and thefts suffered by the maintenance

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(Continued from previous page)

1983 claim. The district court refused to enter a separate judgment. On July 22, 1987, this court reversed and remanded the case for entry of final judgment in accordance with Rule 58 of the Federal Rules of Civil Procedure. Hughes v. Halifax County School Board, 823 F.2d 832 (4th Cir. 1987). The district court then entered final judgment on August 18, 1987, and Hughes filed a timely appeal.

department in particular. The taunts escalated and Gregory said "Let's hang him for it." Gregory and Lloyd then got a rope from the truck and went through a mock hanging of Hughes. Hughes was not amused.

When the group returned to the maintenance office, Hughes told the supervisor, Julian Harrison, of the incident. Hughes told Harrison that the mock hanging was in retaliation for his talking to the grand jury.[2/]

The next day Harrison talked to Lloyd and Gregory, who told stories that differed with that told by Hughes. Harrison also talked to Lacks, the third

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2/Rampant school board corruption received much publicity in this area. The investigation also led to some strained relations between employees, and Harrison was asked by the local prosecutor not to talk about the issue with his subordinates.

co-worker who witnessed the ordeal. Lacks thought everyone was joking. JA 328-33.

On August 9, Harrison met with Dr. Jones, the Superintendent. Jones had been appointed to his post some six weeks earlier when his predecessor resigned under fire. He did not know any of the men involved in the incident. Jones told Harrison to discharge Lloyd, Hughes and Gregory. Hughes was told that he could appeal his discharge to Jones. Hughes never appealed; he filed suit.

Hughes brought suit against Gregory, Lloyd, Harrison, and the school board. He argued that he was discharged because of his race and in retaliation for his cooperation with the grand jury investigation into misdeeds by the school board. He filed a ten count

complaint alleging violations of Title VII, § 1985, § 1983, § 1981, and several pendent state law claims. Hughes voluntarily withdrew four of his claims and suffered directed verdicts or judgments notwithstanding the verdicts on several other claims.[3/]

Hughes appeals his § 1983 claims. He argued in Count 5 of his complaint that he ws deprived of his free speech right in violation of 42 U.S.C. § 1983. The district court granted directed

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3/The jury returned a special verdict which found for Hughes against Lloyd and Gregory on the § 1983 claim. On the state law claims, the jury found for Hughes as against Lloyd, but not Gregory. As compensation, the jury awarded Hughes $5,000, in general damages, plus $18,879 in lost wages. The jury awarded punitive damages to Hughes in the amount of $5,000 against Lloyd and $1,000 against Gregory. The district Court's decision to grant a JNOV on the § 1983 claims and the lost wages award are the only issues before us.

verdicts in favor of the school board and Harrison on these claims. The court sent the § 1983 claims against Gregory and Lloyd to the jury only for purposes of appeal. When the jury returned a verdict in favor of Hughes against Lloyd and Gregory, Judge Kiser granted a JNOV in favor of the co-workers. Hughes contests each of these rulings before this court.

Hughes also appeals the district court's decision to grant a JNOV in favor of Lloyd on the issue of lost wages. In its special verdict, the jury found Lloyd (but not Gregory) liable to Hughes for some $18,000 in lost wages. Judge Kiser granted a JNOV in favor of Lloyd. Hughes contests the JNOV procedurally and on the merits. We are unpersuaded by any of Hughes' challenges to the judgment below. First, we

examine the claims that the directed verdicts for the school board and Harrison on the § 1983 count were improper. Second, we consider Hughes' claim that the JNOV in favor of Lloyd and Gregory on the § 1983 claim was improper. Finally, we discuss the propriety of the JNOV in favor of Lloyd on the lost wages claim.

II.

In ruling on the directed verdict motion, the district court must consider the record as a whole, and construe the evidence in the light most favorable to the non-movant. If the non-movant has presented substantial evidence in support of his position, evidence that is of such quality and weight that a fair and impartial jury could return a verdict for the non-movant, then a directed verdict is improper. Craven v.

Southern Railway, 412 F.2d 835, 836 (4th Cir. 1969).

To establish municipal liability under § 1983, the plaintiff must be able to show that the execution of a municipal policy or custom inflicts an injury. Monell v. Dept. of Social Services of the City of New York, 436 U.S. 658, 694 (1978). Hughes relies on the "custom or usage" aspect of the test to argue that he was injured, and he argues that Harrison was a policymaker who terminated him because of an impermissible motive. Neither position is tenable.

First, Harrison is not a policymaker under state statutory or case law. There is no reference in the state education law to a maintenance supervisor having the authority to terminate employees. Code of Virginia,

Title 22.1. The state constitution gives control of the school system to the school board. Va. Const. Art. VIII, S 7. This control includes supervising personnel. School Board v. Parham, 218 Va. 950, 243 S.E.2d 468 (1978). Furthermore, we note that in Pembaur v. Cincinnati, 475 U.S. 469 (1986), the Supreme Court held that, "[t]he fact that a particular official - even a policymaking official - has discretion in the exercise of particular functions does not, without more, give rise to municipal liability based on an exercise of that discretion." Id. at 481-482. "The official must also be responsible for establishing final-government policy respecting such activity before the municipality can be held liable." Id. 482-483. The law is against Hughes' position that Harrison dictated policy.

Second, the decision to discharge the three employees came from the Superintendent, Dr. Jones, who admitted that he did not know any of the individuals involved. This decision was carried out by Harrison, but not formulated by him.[4/]

Third, there is a complete lack of evidence of any "custom or usage" engaged in by the school board to retaliate against whistleblowers. Hughes did not attempt to prove any kind of retaliation beyond the above-described incident. "Proof of a single incident of unconstitutional activity is not sufficient to impose liability under Monell." City of

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4/Even if Harrison had made the decision to discharge Hughes, the decision could be appealed to the Superintendent. This appellate process makes Harrison's act not the final act of policy.

Oklahoma City v. Tuttle, 471 U.S. 808, 823-24 (1983). There is no reasonable inference of custom or usage that can be derived from these facts.

Finally, there is no evidence of a retaliatory motive on the part of the board. This court, in Lovelace v. Sherwin-Williams Co., 681 F.2d 230, 241-42 (4th Cir. 1982) explained that evidence which shows a probability, reasonable probability, or substantial probability of improper motive could go to the jury. A mere possibility, however, is insufficient to get to the jury. See also, Foster v. Tandy Corporation, 828 F.2d 1052, 1056 (4th Cir. 1987). This probability standard is not met by Hughes' proof. He argues that Harrison retaliated by being cold to him. Harrison testified that during the period of tension, he was told not

to talk to his subordinates, and that he was not aware of the extent of Hughes' participation in the investigations. Dr. Jones did not know any of those involved. The evidence, as we know it, reveals that Hughes complained to Harrison, Harrison spoke to Jones, and Jones decided to discharge the whole bunch. This does not amount to retaliatory motive absent the speculation eschewed in Lovelace.

Furthermore, we note that the district court did not err in directing a verdict for Julian Harrison on the § 1983 claim. Proving supervisory liability is a difficult task in § 1983 cases. Slaken v. Porter, 737 F.2d 368, 373 (4th Cir. 1984). Hughes argues that the only conclusion to be reached is that he was discharged by Harrison for an impermissible motive. One fact ends

this argument -- Harrison did not discharge Hughes, Jones did. The district court correctly found no supervisory liability here.

III.

Hughes asserts that the actions of Gregory and Lloyd rose to the level of constitutional torts and seeks relief under § 1983. To obtain such relief, he must show that his co-workers deprived him of a constitutional or federal right, and that they were clothed with state authority in so acting. Flagg Bros., Inc. v. Brooks, 436 U.S. 149, 155 (1978); Adickes v. S.H. Kress & Co., 398 U.S. 144, 150 (1970). Section 1983 proscribes the "misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state

law." Monroe v. Pape, 365 U.S. 167, 185 (1961).

Hughes argues that he was assaulted, battered, and subjected to intentional emotional distress under color of state law because he was accosted by county employees with retaliation in their eyes, on county land, with a county-owned rope, during work hours. He places particular emphasis on the motive of the attackers as evidencing state action. To support his claim, he cites to this court a number of cases wherein police officers or judges were held to have been acting under color of state authority during improper arrests or injudicious judicial acts. The above cases are distinguishable because the actions complained of were committed while the defendants were purporting to act under

the authority vested in them by the state, or were otherwise made possible because of the privileges of their employment. The judges were figuratively and literally clothed in state power, and the officers were acting behind badges. Gregory and Lloyd were wearing, at best, county coveralls. The indicia of state authority just isn't the same. Furthermore, if the actions of Gregory and Lloyd amount to state action, any employee of any state who commits a tort has potentially violated § 1983. We cannot endorse such a result.

IV.

After the jury returned a verdict against Lloyd on the issue of lost wages, Lloyd petitioned the court for a JNOV, arguing that the hanging incident was not the proximate cause of Hughes'

lost wages. Judge Kiser ruled that Lloyd was correct, that the incident did not proximately cause Hughes' loss. Hughes attacks Judge Kiser's disposition in two ways.

First, he argues that the JNOV was procedurally improper because Lloyd did not make a motion for a directed verdict on the issue of lost wages before the jury rendered its verdict. Second, he argues that the scuffle at Turbeville was indeed the proximate cause of his loss. As to the first argument, Judge Kiser made plain to all the parties that he would grant a JNOV on the claim if the jury came back with a plaintiff's verdict. As a result, it was understood by everyone that a directed verdict had

already, technically been entered.[5/] Lloyd's position was preserved and ripe for a JNOV.

Hughes' second argument, that Gregory and Lloyd's attack proximately caused his lost wages is also unpersuasive. Whatever Lloyd and Gregory did to Hughes at the school, they could not directly cause him to lose his job and his wages. Only Dr. Jones could take Hughes' job from him and there is no allegation that Lloyd and Gregory have control over Jones.[6/]

5/Judge Kiser explained his belief that "[s]ubmission to the jury of the question of lost wages was a necessray element of damages in regard to the S 1983 claim (Count V), but it was understood that a directed verdict had already been entered as to this count...." Joint Appendix at 274.

6/We note that Hughes' complaint undercuts his causation position on appeal. The complaint does not allege

(Continued on next page)

The issues raised by Hughes are not compelling and the verdicts below are

AFFIRMED.

(Continued from previous page)

that the cause of his dismissal was the assault, but rather that it was "the direct result of his cooperation with the Grand Jury investigation and the fact that he is black." Joint Appendix at 10.

APPENDIX II

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA

DANVILLE DIVISION

CHANDLER NELSON HUGHES,

Plaintiff,

v. Civil Action No. 85-0161-D

HALIFAX COUNTY SCHOOL
BOARD, ET AL,

Defendant.

ORDER

Before the Court is Defendant Herbert Lloyd's Motion for Judgment Notwithstanding the Verdict filed pursuant to Fed. R. Civ. P. 50(b) seeking to reverse a jury's finding that he is liable for Plaintiff Chandler Nelson Hughes' lost wages in the amount of $18,879.00. I shall grant the Defendant's Motion.

Plaintiff Hughes, a former maintenance worker with the School Board

of Halifax County, Virgiia, filed this suit against the School Board; his former supervisor, Julian Harrison; and three of his former co-workers, Herbert Lloyd, James Gregory, and Tommy Lacks./1 In his suit, Hughes alleged injuries resulting from an attempted mock lynching he suffered at the hands of his co-workers at the Turbeville Elementary School on August 8, 1984. In particular, Hughes based his suit on the following causes of action: Count I (Title VII of the Civil Rights Act of 1964); Count II (42 U.S.C. § 1985); Count III (a deprivation of equal protection in violation of 42 U.S.C. § 1983); Count IV (42 U.S.C. § 1981); Count V (a deprivation of free speech in violation of 42 U.S.C. § 1983); Count VI (assault and battery); Count VII (intentional infliction of emotional

distress); Count IX (fraud and deceit as to Defendants Lloyd and Gregory); and Count X (unlawful conspiracy in violation of Va. Code § 18.2-499 and 500).

The case proceeded to trial. At the end of the Plaintiff's evidence, the Plaintiff voluntarily dismissed Counts II, III, IV and VII. I granted the School Board and Harrison's motion for a directed verdict as to Counts V, VI, VIII, and X. I also granted Lloyd and Gregory's motion for a directed verdict as to Count X, and reserved my ruling as to Counts V, VI, VIII, and IX.

The parties then presented their stipulated evidence as to Count I, the Title VII claim. After hearing all of this evidence, I granted judgment for the Defendants on this claim, thus

totally eliminating the School Board and Harrison from the suit.

At the close of all the evidence, I granted Lloyd and Gregory's motion for a directed verdict as to Count IX. I also granted their motion as to Count V on the ground that the Plaintiff had failed to prove any state action, but in chambers I agreed to submit Count V to the jury for the sole purpose of making a record for an appeal. Accordingly, I submitted Counts V (42 U.S.C § 1983), VI (assault and battery), and VIII (intentional infliction of emotional distress) to the jury.

In regard to Count V, the jury rendered a verdict against both Defendants Lloyd and Gregory. In regard to Counts VI and VIII, the jury rendered its verdict against Lloyd, but in favor of Gregory. As compensatory damages,

the jury awarded Hughes $5,000.00 plus $18,879.00 in past lost wages. As punitive damages, the jury awarded Hughes $5,000.00 against Lloyd and $1,000.00 against Gregory.

After the jury returned its verdict, Defendants Gregory and Lloyd moved the Court for judgment notwithstanding the verdict as to Count V in accordance with the Court's earlier ruling in chambers. These motions were granted. Defendant Lloyd then requested ten (10) days in which to file a memorandum of authorities for his Motion for Judgment Notwithstanding the Verdict as to the other issues. The Court granted this request.

Within ten (10) days, Defendant Lloyd filed his Motion for Judgment Notwithstanding the Verdict, at issue before the Court now, in which he seeks

to reverse the jury's finding that he is liable for the Plaintiff's lost wages. Lloyd argues that the Plaintiff cannot recover lost wages from him because his actions at the Turbeville Elementary School were not the proximate cause of the Plaintiff's lost wages.

Soon thereafter, the Plaintiff filed a brief in opposition to the Defendant's motion in which the Plaintiff challenged the procedural validity of the Defendant's j.n.o.v. motion. In particular, the Plaintiff alleged that: (1) the Defendant's failure to move for a directed verdict at the close of all the evidence precludes consideration of the j.n.o.v. motion; (2) the Defendant's failure to raise the issue of the propriety of an award of lost wages in his prior motions precludes consideration of this issue in

a j.n.o.v. motion; and (3) the Defendant's failure to object to the jury charge in regard to the lost wages waives any objections the Defendant may now have.

The Plaintiff's first charge of procedural irregularity is without merit because a review of the transcript of the trial reveals that Defendants Lloyd and Gregory did indeed renew their motions for a directed verdict at the close of all the evidence. In my view, Plaintiff's second and third charges of irregularity are also without merit. Submission to the jury of the questions of lost wages was a necessary element of damages in regard to the § 1983 claim (Count V), but it was understood that a directed verdict had already been entered as to this Count, and that it was only being submitted to the jury for

purposes of appeal. Because Lloyd's actions were not the proximate cause of Hughes' lost wages, I shall grant Lloyd's j.n.o.v. motion.

Accordingly, it is hereby ADJUDGED and ORDERED that:

1. Judgment be entered in favor of the School Board and Harrison.

2. Judgment be entered in favor of Gregory.

3. Judgment be entered in favor of Plaintiff Hughes against Lloyd in the amount of $5,000.00 compensatory damages and $5,000.00 punitive damages, but not the $18,879.00 in lost wages.

4. The Clerk is directed to send a certified copy of this Order to all counsel of record.

5. And nothing further remaining to be done in this case, it is hereby

dismissed and stricken from the active docket of this Court.

ENTER this 12th day of August, 1986.

Jackson L. Kiser
United States District Judge

1/ The Plaintiff later voluntarily dismissed Defendant Lacks from the lawsuit.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF VIRGINIA

CHANDLER NELSON HUGHES

v. JUDGMENT IN A CIVIL CASE

HALIFAX COUNTY SCHOOL BOARD and TOMMY LACKS Case No. 85-0161-D

X Jury Verdict. This action came before the court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

Decision by Court. This action came to trial or hearing before the court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED as follows:

1. Judgment is entered in favor of the School Board and Harrison.

2. Judgment is entered in favor of Gregory.

3. Judgment is entered in favor of Plaintiff Hughes against Lloyd in the amount of $5,000 compensatory damages and $5,000 punitive damages. Plaintiff shall recover interest on both the compensatoy and the punitive damages at the rate of 6.56% per annum from June 2, 1986, until paid.

4. The Clerk is directed to send a certified copy of this Order to all counsel of record.

5. And nothing further remaining to be done in this case, it is hereby dismissed and stricken from the active docket of the Court.

ENTER:

August 18, 1987

Jackson L. Kiser
U. S. District Judge

APPENDIX III

[AMENDMENT I]
[Freedom of Religion, of Speech, and of the Press]

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

[AMENDMENT XIV]

Section 1.
[Citizenship Rights Not to Be Abridged by States]

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 1983. Civil action for deprivation of rights. Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of

the United States or other persons within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the person injured in an action of law, suit in equity, or other proper proceedings for redress. For purposes of this section, any Act of Congress applicable exclusively to the District ofColumbia shall be considered to be a statute of the District of Columbia.

Rule 50 of the Federal Rules of Civil Procedure. Motion for a Directed Verdict and for Judgment Notwithstanding the Verdict.

(a) Motion for Directed Verdict: When Made; Effect. A party who moves for a directed verdict at the close of the evidence offered by an opponent may offer evidence in the event that the motion is not granted, without having reserved the right so to do and to the same extent as if the motion had not been made. A motion for a directed verdict which is not granted is not a waiver of trial by jury even though all parties to the action have moved for directed verdicts. A motion for a directed verdict shall state the specific grounds therefor. The order of the court granting a motion for a directed verdict is effective without any assent of the jury.

(b) Motion for Judgment Notwithstanding the Verdict. Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later

determination of the legal questions raised by the motion. Not later than 10 days after entry of judgment, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with the party's motion for a directed verdict; or if a verdict was not returned such party, within 10 days after the jury has been discharged, may move for judgment in accordance with the party's motion for a directed verdict. A motion for a new trial may be prayed for in the alternative. If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. If no verdict was returned the court may direct the entry of judgment as if the requested verdict had been directed or may order a new trial.

PROOF OF SERVICE AND FILING CERTIFICATE

I, Stephen W. Bricker, hereby certify that on this 23rd day of November, 1988, I filed with the Clerk's Office of the Supreme Court of the United States the foregoing Petition for a Writ Of Certiorari. I am a member of the Bar of the Supreme Court of the United States and state that to the best of my knowledge that the mailing of the petition took place on the date above, within the permitted time for filing the petition. I further certify that on this same date I deposited the same in a United States post office, with first-class postage prepaid, along with the required copies to the opposing counsel listed below:

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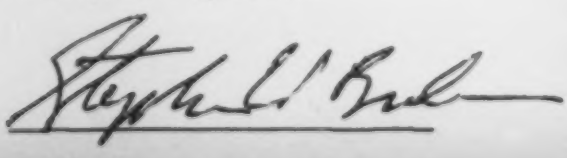

Stephen W. Bricker
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State of Virginia

City of Richmond, to wit:

I, Virginia R. Schuster, a Notary Public in and for the jurisdiction aforesaid, do certify that Stephen W. Bricker, whose name is subscribed above, signed and acknowledged his signature in my presence, and further stated that the statements made are true to the best of his knowledge and belief.

Virginia R. Schuster
Notary Public

My commission expires: 9/7/92.